

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of)	
1991)	
)	

To: The Commission

**COMMENTS OF
LCC INTERNATIONAL, INC.**

LCC International, Inc. (“LCC”), by its attorneys, hereby submits these comments in response to the Commission’s recent Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding. 1/ LCC limits its comments to issues relating to clarification of the definition of “automatic telephone dialing systems” (“autodialers”), as that term is used in the Commission’s rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”). 2/ LCC believes, in response to the Commission’s specific question, that it is indeed “necessary to identify the technologies section 227 is designed to address.” 3/ As part of this process, LCC requests that the Commission clarify that certain devices – in particular, modems

1/ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, FCC 02-250 (rel. Sept. 18, 2002) (“NPRM”).

2/ See 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

3/ NPRM at ¶ 23.

not used in the transmission of unsolicited advertising – are *not* autodialers and therefore are not covered by the TCPA. In doing so, the Commission would discourage the type of frivolous law suit, currently faced by LCC, that attempts to pervert the purpose underlying the TCPA by propounding contorted and irrational interpretations of the term “autodialer.” These comments describe how LCC unwittingly came to be accused of violating the TCPA, and how the Commission can, with appropriate clarifying rules, help prevent such future abuse of the TCPA by opportunistic plaintiffs.

Factual Background. LCC is not a telemarketer, does not provide telemarketing-related services, and does not use telemarketing to solicit business. Rather, LCC is in the business of providing system design and deployment services for companies that own and operate wireless communications systems. ^{4/} One LCC client is XM Satellite Radio Corporation (“XM”), ^{5/} for which LCC has installed terrestrial repeaters across the country. These repeaters receive satellite signals and retransmit the signals into areas (such as “urban canyons” between tall buildings) that the signals would not otherwise reach. The repeaters installed by LCC contain an on-board modem. If a repeater malfunction occurs, the repeater uses the modem to call (via a toll-free number) an XM monitoring center and

^{4/} For example, LCC provides installation services for communications repeaters; helps customers manage and complete network deployments; identifies potential cell sites; secures necessary zoning permits and leases; and installs other sophisticated communications systems tailored to its customers’ needs.

^{5/} XM is a Satellite Digital Audio Radio Service (SDARS) licensee.

transmit pertinent data to XM technicians. Each repeater's modem can only store a single telephone number.

In Spring 2001, one XM repeater in Delaware was apparently installed with a wrong number programmed into the modem. Shortly thereafter, in early May 2001, the repeater experienced a technical malfunction and attempted to dial XM's monitoring center to report the problem. Instead of reaching XM, however, the repeater called the toll-free number belonging to the home-based insurance business of James Rounsavell and Jeannette Pulley ("Plaintiffs") in Sacramento, California. In a vain attempt to connect with the XM monitoring center, the repeater's modem allegedly dialed the Plaintiffs' number repeatedly over the next several days, adding approximately \$450 in "1-877" toll charges to the Plaintiffs' telephone bill. ^{6/}

LCC did not learn of the misdirected calls until September 20, 2001, when it was served with a copy of a complaint filed by Plaintiffs' counsel in Sacramento Superior Court, alleging that LCC had violated the TCPA by calling their toll-free number using an autodialer. ^{7/} LCC denied the alleged TCPA violation, but in recognition of the inconvenience the misdirected calls may have caused, LCC offered the Plaintiffs \$5,000 to settle the claim (even though Plaintiffs offered no evidence of damages beyond the telephone toll charges incurred). Rather

^{6/} Plaintiffs have not indicated whether they personally answered any of the modem's calls, or whether the calls were answered by a voice messaging system.

^{7/} 47 U.S.C. § 227(b)(1)(A)(iii) prohibits any person from placing calls using an autodialer to, *inter alia*, "any service for which the called party is charged for the call."

than accept this offer of more than ten times their actual damages, the Plaintiffs chose to continue pursuing their claim under the TCPA, which, under section 227(b)(3), provides successful claimants with \$500 in damages per call, which in this case could amount to as much as \$2.8 million based on the number of calls placed by the errant modem. The section allows for treble damages upon a finding of “willful or knowing” violations, bringing the maximum potential damages to approximately \$8.4 million in this case.

Although LCC fully expects to prevail on the merits (for reasons explained below) should the case reach a judge, the harm to LCC from this frivolous litigation is significant. LCC estimates that it has already incurred some \$35,000 in legal fees in defense of this suit, which is still only in the discovery stage. Moreover, the suit has created a noticeable management distraction, given the amount of time and energy required to handle the case, including investigating and responding to the allegations.

Modems Do Not Satisfy the Statute’s “Autodialer” Definition.

LCC is confident it will prevail if the case eventually goes to trial. As LCC’s counsel has explained to Plaintiffs’ counsel, LCC could only be liable under the TCPA if the repeater’s modem satisfied the definition of “automatic telephone dialing system.” This term is defined in section 227(a)(1) as “equipment which has the capacity – (A) to store or produce telephone numbers to be called using a random or sequential number generator; and (B) to dial such numbers.” ^{8/} The modem in the repeater

^{8/} 47 U.S.C. § 227(a)(1).

installed by LCC stores and dials only one pre-programmed number. It does not store, produce or dial numbers that are generated randomly or sequentially, and is therefore not an autodialer subject to the TCPA's restrictions. The plain language of the statutory definition also requires that an autodialer be capable of dialing "numbers," whereas the modem at issue can dial no more than one number.

Moreover, calls made by the repeater modems are not placed for any telemarketing or other solicitation purpose. As the Commission itself has recognized, Congress enacted the TCPA specifically to address the "growing number of telephone marketing calls and certain telemarketing practices." ^{9/} Enforcing the TCPA against parties placing calls devoid of any marketing or solicitation purpose would be contrary to Congressional intent.

Clarification of the "Autodialer" Definition Would Help Eliminate Baseless TCPA Suits and Would Assist Judges in Making Technical Findings. Although LCC is confident, for the reasons described above, that the repeater-based modems at issue are not autodialers, the Plaintiffs have rejected LCC's analysis. Instead, Plaintiffs' counsel offered his own interpretation – however strained – that the "sequential number" generation and dialing referenced in section 227(a)(1) could apply to situations in which "a particular number is dialed over and over again in a particular time sequence." ^{10/} Although LCC believes this nonsensical interpretation will fail if eventually subjected to judicial scrutiny, LCC

^{9/} NPRM at ¶2 (citing TCPA, Section 2).

^{10/} Letter from Fred P. Hayes, Esq., counsel for James Rounsavell and Jeannette Pulley, to David R. Singer, Esq., counsel for LCC International, Inc. (Aug. 26, 2002).

nevertheless believes that Commission clarification on what does – and does not – constitute an autodialer would be of significant benefit. First, it would eliminate the type of contorted interpretations illustrated above, as well as the baseless lawsuits founded on such interpretations. Second, it would provide helpful guidance to judges across the country who may not be accustomed to deciding technical issues of fact relating to the proper classification of telecommunications equipment. ^{11/} Moreover, the Commission noted in the NPRM that it has received a number of inquiries about whether certain technologies are classified as autodialers, indicating a general need for additional clarification. ^{12/}

The Commission should not assume that the factual circumstances leading to LCC's current predicament are exceptional, or are limited to the particular repeaters installed by LCC. Remote alarm systems are becoming increasingly common in the telecommunications industry. These systems benefit consumers, as they can alert service providers to equipment failure and provide diagnostic data related to that failure, almost instantaneously. This permits the service provider to address service outages more quickly and efficiently, thereby benefiting consumers and improving the reliability of the nation's communications infrastructure.

^{11/} Congress indicated that when considering claims under the TCPA, courts should look not only to the statute but to the Commission's regulations. 47 U.S.C. § 227(b)(3).

^{12/} See NPRM at ¶ 23.

Like the repeaters installed by LCC, many of these systems use modems to dial toll-free numbers to reach a monitoring center. It is not difficult to imagine that other aggressive plaintiffs' lawyers may attempt to twist the definition of "autodialer" and allege a violation under 47 U.S.C. § 227(b)(1)(A)(iii) when an inadvertent misdialing occurs. Thus, a clarification of the autodialer definition could help protect a wide array of telecommunications monitoring equipment vendors, installers and users from the type of unfounded litigation being faced by LCC.

The Commission Should Amend its Rules or Otherwise Clarify that Modems Are Not Autodialers. LCC urges the Commission to amend its rules to indicate that modems used for non-telemarketing purposes are specifically excluded from the definition of autodialers. While the amendment could take a variety of forms, LCC suggests that section 64.1200(f)(1) be amended to state that:

These terms [*automatic telephone dialing system* and *autodialer*] specifically do not include modems used to transmit data not containing any unsolicited advertisement.

Based on other comments received in this proceeding, the Commission may determine that non-fax modems or modems in general (without reference to the content of the data transmitted), and/or other types of telecommunications equipment should be excluded from the autodialer definition in this section. In the alternative, should the Commission determine that an actual amendment of its rules is not appropriate in this instance, LCC requests that the Commission provide a clarification in the text of its report and order released in this rulemaking

proceeding, stating that modems do not satisfy the definition of an autodialer for purposes of the TCPA. Additionally, in light of the novel interpretation of “sequential number generator” encountered by LCC in defending its current lawsuit, the Commission may also wish to clarify that this term refers to the sequential nature of the digits in the telephone numbers, not to one number that is dialed repeatedly in a particular “time sequence.”

The Commission Should Act Cautiously if It Expands the “Autodialer” Definition to Include Devices with Databases. Finally, additional clarification may be required should the Commission implement the suggestion, contained in its NPRM, to expand the definition of autodialers to include any equipment that “can generate phone calls from a database of existing numbers.” ^{13/} LCC is concerned that such an amendment could open the door to arguments that any device with the capability to store and dial a number or numbers indicates the presence of a “database” and therefore automatically renders the device an autodialer. If the Commission determines that the definition of autodialer should be expanded, it should carefully craft the new language to prevent over-inclusive interpretations. For example, it could specify that some minimum quantity of stored telephone numbers is required to constitute a database. At a minimum, the Commission should clarify that a device capable of dialing only a single stored number does not contain a “database” and is therefore not an autodialer.

^{13/} *Id.* at ¶ 24.

Conclusion. The current proceeding provides the Commission with an excellent opportunity to discourage the filing of frivolous lawsuits by plaintiffs who seek to abuse the TCPA's private right of action provision in hopes of obtaining a windfall in damages or settlement fees. LCC is confident that Congress did not intend the passage of the TCPA to lead to an \$8.4 million lawsuit resulting from a single misprogrammed telephone number. In order to prevent such claims in the future, LCC respectfully requests the Commission to clarify that modems used for non-telemarketing purposes, such as those modems incorporated in the terrestrial repeaters installed by LCC, are not "autodialers" for purposes of the TCPA and the Commission's implementing rules.

Respectfully submitted,

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